Supreme Court, U.S.
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No. 00-1704

In The

Supreme Court of the United States

BARBARA BROWN,

Petitioner,

v.

PATRICIA A. McCORMICK, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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CORPORATE DISCLOSURE STATEMENT PURSUANT TO RULE 29.6

Amblin' Entertainment, Inc. has no parent corporation. There is no publicly held company that owns 10% or more of the stock of Amblin' Entertainment, Inc.

Universal City Studios, Inc. and Universal Studios Consumer Products, Inc. are directly wholly owned by Universal Studios, Inc. Universal Studios, Inc. is indirectly ultimately owned 92% by Vivendi Universal S.A., and 8% by Matsushita Electric Industrial Co., Ltd., both of which are publicly held.

Marketing and Financial Management Enterprises, Inc. has no parent corporation. There is no publicly held company that owns 10% or more of the stock of Marketing and Financial Management Enterprises, Inc.

That Patchwork Place, Inc. (now known as Martingale & Co., Inc.) has no parent corporation. There is no publicly held company that owns 10% or more of the stock of That Patchwork Place, Inc. (now known as Martingale & Co., Inc).

The parent corporation of The Greenwich Workshop, Inc. is Hallmark Cards, Inc. There is no publicly held company that owns 10% or more of the stock of The Greenwich Workshop, Inc.

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STATUTES:

17 U.S.C. § 504(b) 3, 4, 8

I.

REASONS FOR DENYING THE WRIT

Neither the record below nor the decision below raises the questions presented by the Petition. Petitioner's first question is whether the District Court should have awarded Petitioner all of the profits realized by Respondent Amblin' Entertainment, Inc. ("Amblin' ") from the motion picture *How to Make an American Quilt* (the "Picture"), after finding that the fleeting use of Petitioner's quilt block pattern in a motion picture prop was infringing. Petitioner bases this question solely on Petitioner's argument that the apportionment of profits testimony of expert witness Arnold Margolin was offered exclusively on behalf of Respondent Universal City Studios, Inc. ("Universal"). Petitioner cites no support in the record for her claim that Margolin's testimony was offered only on behalf of Universal, because there is none. Amblin' and Universal, the producers of the Picture, presented Margolin as an expert witness on the value of Petitioner's pattern to any profits realized from the Picture. The trial court applied Margolin's analysis to profits generated by Amblin' from the Picture. Margolin never testified, either in his report or during his testimony, that his analysis applied only to Universal's profits. Moreover, Respondents argued at trial that Margolin's analysis applied to Amblin's profits, and Petitioner did not object at trial to the application of Margolin's testimony to Amblin's profits.

Petitioner's second question is whether the District Court erred in admitting Margolin's testimony under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579,

113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), and *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999). This question is based upon Petitioner's argument that the District Court did not perform a relevancy and reliability assessment before accepting Margolin's testimony. Again, Petitioner's issue is not presented here. The record reflects that the District Court considered Margolin's expertise and methodology, heard argument from counsel regarding the admissibility of Margolin's testimony, and reviewed authorities cited by counsel, before affirming his ruling that he would accept Margolin's testimony. The type of expert testimony on apportionment of profits submitted by Margolin was approved by this Court in *Sheldon v. Metro-Goldwyn Pictures Corporation*, 309 U.S. 390, 60 S.Ct. 681, 84 L.Ed. 825 (1940). The record reflects that the District Court fully complied with this Court's holdings in *Daubert* and *Kumho* regarding the broad latitude permitted to District Courts in determining the relevancy and reliability of such expert testimony.

II.

STATEMENT OF FACTS

Respondents Amblin' and Universal produced the motion picture *How to Make an American Quilt*.[1] (FF 3, 4,

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[1] Because there is no support in the record for her argument that Margolin's testimony was offered exclusively on behalf of Universal, Petitioner attempts to draw distinctions between Amblin' and Universal which Petitioner fails to explain or substantiate. (Nor does Petitioner explain why such distinctions, if valid, would have any significance to the application of Margolin's analysis.) For example, Petitioner

10; Pet. Appendix B-6, B-7) The script for the Picture called for certain quilts, including two quilts entitled "The Life Before" and "Where Love Resides." Patricia McCormick, the technical consultant for the Picture, commissioned Petitioner to create patterns for fifteen blocks for "The Life Before" quilt. Petitioner set the price for her patterns at $50 per block. One of the patterns created by Petitioner for "The Life Before" quilt was the Wedding Block pattern. McCormick subsequently used the Wedding Block pattern to create another block entitled the Marriage Block, which McCormick incorporated into the "Where Love Resides" quilt. (FF 12, 13, 15, 17, 18, 22-25, 30, 35-42; Pet. Appendix B-8 to B-17) The Marriage Block

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attempts to distinguish between the two Respondents by characterizing Amblin' as the "film production company" and Universal as the "film studio company" (Petition, p. 2). This distinction is not based upon any citation to the record and is contrary to the District Court's Findings. The District Court found that both Amblin' and Universal were motion picture producers (Finding of Fact ("FF") 3 and 4; Appendix B-6 to the Petition ("Pet. Appendix")), and that both Amblin' and Universal produced and filmed the Picture. (FF 10; Pet. Appendix B-7) Furthermore, the District Court referred interchangeably to both Amblin' and Universal as the "studio" and did not refer to either entity as the "film production company." (See FF 18, 19, 20, 25, 27, 31, 34, 35, 37, 53; Pet. Appendix B-9 to B-19) Similarly, Petitioner's argument that Margolin's analysis did not apply to Amblin's profits because Respondents cited case law regarding gross revenues or gross receipts (Petition, p. 10) is unavailing. The District Court found that Amblin's production fee constituted gross revenue from the Picture under 17 U.S.C. § 504(b); absent that finding, the District Court could not have awarded Petitioner any portion of Amblin's production fee.

appeared for approximately 50 seconds, usually as background, in the approximately two-hour Picture (Trial Transcript ("TT") [5/27/99] 117). The Picture was the product of the contributions of hundreds of people and the investment of over $50,000,000 (FF 51).

At trial, Petitioner sought to recover a portion of the profits generated by Respondents Universal and Amblin' from the Picture under 17 U.S.C. § 504(b). Pursuant to Section 504(b), Petitioner introduced evidence of Universal's and Amblin's gross revenues from the Picture. Respondents offered the testimony of expert witness Arnold Margolin, a producer, to testify regarding the elements of profit of the Picture attributable to factors other than the copyrighted work. This Court has expressly recognized that producers are appropriate expert witnesses to testify to "the elements of profit attributable to factors other than the copyrighted work" under Section 504(b).

Margolin testified to his experience in the motion picture and television industry as a professional producer since 1965. Respondents offered Margolin as an expert "with respect to the value of the contribution of Petitioner's block to the motion picture at issue." (TT [5/27/99] 42:9-11) Petitioner conducted voir dire of Margolin. Following voir dire, Petitioner objected to Margolin's testimony based "upon the *Daubert v. Merrell Dow* case and then the later case of *Kumho Tire v. Carmichael.*"[2]

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[2] The *Daubert/Kumho* objection was the only objection asserted by Petitioner at trial to the admission of Margolin's testimony (TT [5/27/99] 46:7-48:18).

The Court heard argument from counsel, including citations to the Copyright Act, *Sheldon*, *Daubert* and *Kumho*, and ruled that it would receive Margolin's testimony. (TT [5/27/99] 49:13-51:7) At Petitioner's request, the Court subsequently re-reviewed the *Kumho* decision and affirmed its decision to admit Margolin's testimony. (TT [5/28/99] 1329:9-14) Margolin submitted a 30-page expert report which was admitted into evidence (Defendants' Exh. 67), and testified at length at trial (TT [5/27/99] 39-117).

Margolin testified regarding the value of Petitioner's contribution to the Picture in relation to the value of the entire Picture; how to allocate resources in budgeting a motion picture; and the weight given to various aspects of production (TT [5/27/99] 43-44). Margolin concluded that the value of Petitioner's pattern to the Picture was .000001176 or .0001176%.[3] (TT [5/27/99] 68)

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[3] Specifically, in analyzing the contribution of Petitioner's pattern to the entire Picture, Margolin broke down his analysis into the following steps: (a) Margolin analyzed the value of Petitioner's pattern to the Marriage Block. The idea for the block and the style of the block were dictated by the script for the Picture; McCormick modified and supplemented Petitioner's pattern; and McCormick selected colors and fabrics for the block and physically constructed the block. Accordingly, Margolin concluded that Petitioner's contribution to the Marriage Block was 1/10 or .1. (b) Margolin then considered the value of the Marriage Block to the "Where Love Resides" quilt. Since there were sixteen blocks and a border in the "Where Love Resides" quilt, Margolin concluded that the Marriage Block's contribution to the "Where Love Resides" quilt was 1/17 or .0588. (c) Margolin then analyzed the value of the "Where Love Resides" quilt to the Picture. In that analysis, Margolin considered the value contributed to the Picture by the

Respondents argued at trial that neither Universal nor Amblin' had realized any profits on the Picture, but that to the extent the Court found that either Respondent had realized profits under the Copyright Act, Margolin's analysis should be applied to any such profits. The District Court found that Amblin's $2,000,000 production fee for its services on the Picture constituted profits. The District Court applied Margolin's analysis to Amblin's profits from the Picture by multiplying .000001176 (the value of Petitioner's pattern to the Picture) times $2,000,000 (Amblin's "profits" from the Picture) to arrive at the allocated amount of Amblin's profits awarded to Petitioner:

> "Brown is entitled to an allocated share of any profits earned by the defendants for use of the Marriage Block in the Movie. Universal lost money on the Movie, so there are no profits to share. Amblin received a production fee of $2 million, which the Court finds to be the appropriate measure from which to calculate Brown's damages. The defendants' expert testified that the value of Brown's contribution to the Movie

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performers, novel and screenplay, director, producer, promotion and advertising, music, cinematography, editing, physical production, and post-production. The quilt fell under physical production, which included other elements of the Picture such as production designer, wardrobe, art director, set decorator, hair and makeup, locations, art work and mosaics, quilts and special effects. Margolin concluded that the value of the entire "Where Love Resides" quilt to the Picture was .0002. Margolin arrived at the value of Petitioner's pattern to the Picture (.000001176 or .0001176%) by multiplying .1 times .0588 times .0002 ((a) times (b) times (c)). (TT [5/27/99] 58-69; Defts. Ex. 67, pp. 4-13)

through the Marriage Block was .0001176% of the total value of the Movie. (*See* Def. Ex. 67 at 13.) The Court accepts this testimony and awards Brown .0001176% of Amblin's $2 million in profits, or $2.35." (Conclusion of Law 33(g); Pet. Appendix B-38)

III.

NEITHER THE RECORD BELOW NOR THE DECISION BELOW RAISES THE QUESTIONS PRESENTED BY THE PETITION

A. Amblin' Presented Evidence Regarding The Elements Of Motion Picture Profit Attributable To Factors Other Than Petitioner's Copyrighted Pattern, And The District Court Applied That Evidence To Apportion Amblin's Profits From The Picture

1. Amblin' Submitted Evidence Regarding The Value Of Petitioner's Copyrighted Pattern To The Picture

Amblin' submitted Margolin as an expert witness on the value of Petitioner's pattern to the Picture. The District Court determined that Petitioner should be awarded a percentage of Amblin's profits (Amblin's production fee) which equaled the percentage of the value of the Picture attributable to Petitioner's pattern, as determined by Margolin. Although Amblin' disputed that its production fee should be considered profits, the method the District Court used to determine the amount of the fee due to Petitioner was proper. Indeed, the District Court had a duty to allocate profits between infringing and noninfringing elements. The District Court's result was supported not only by Margolin's testimony but also by

common sense. Petitioner's only contribution was the drawing of a black-and-white pattern based upon the idea and style dictated by the script for the Picture. McCormick then used Petitioner's pattern to create a second pattern, which was translated by McCormick, through the use of fabrics and colors selected by McCormick, into a quilt block which the District Court found to be infringing. The infringing quilt block appeared, mostly in background, for approximately 50 seconds in a motion picture which was approximately two hours long. (Defts. Ex. 67, p. 13) The motion picture was the product of the efforts of hundreds of people and the investment of over $50,000,000 (FF 51).

2. The Copyright Act Provides For Apportionment Of The Infringer's Profits, And This Court Has Approved The Use Of Expert Testimony Of Producers To Perform Such Apportionment

The Copyright Act, 17 U.S.C. § 504(b), states that:

> "The copyright owner is entitled to recover the actual damages suffered by him or her as a result of the infringement, and any profits of the infringer that are attributable to the infringement and are not taken into account in computing the actual damages. In establishing the infringer's profits, the copyright owner is required to present proof only of the infringer's gross revenue, and the infringer is required to prove his or her deductible expenses and the elements of profit attributable to factors other than the copyrighted work."

The District Court's reliance upon Margolin's expertise and methodology is supported by six decades of authority. This Court held in 1940 that, "where it is clear that all the profits are not due to the use of the copyrighted material" and where there is evidence upon which the court can fairly divide the profits to give to the copyright proprietor her fair share of profits attributable to the use of her copyright, it is proper for the court to apportion the profits. *Sheldon v. Metro-Goldwyn Pictures Corporation*, 309 U.S. 390, 402 (1940). The Circuits are in agreement on this issue; *see Cream Records, Inc. v. Jos. Schlitz Brewing Company*, 754 F.2d 826, 828-29 (9th Cir. 1985) ("[I]n cases such as this where an infringer's profits are not entirely due to the infringement, and the evidence suggests some division which may rationally be used as a springboard it is the duty of the court to make some apportionment," *quoting Orgel v. Clark Boardman Co.*, 301 F.2d 119, 121 (2d Cir.), *cert. denied*, 371 U.S. 817 (1962));[4] *see also Walker v. Forbes*, 28 F.3d 409, 412 (4th Cir. 1994) (courts "must be guided by the rule that the statute

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[4] Petitioner inaccurately characterizes the subsequent, inapposite decision in *Cream Records, Inc. v. Joseph Schlitz Brewing Co.*, 864 F.2d 668 (9th Cir. 1989). In that case, unlike this case, the defendant "introduced no evidence of . . . the elements of profit attributable to factors other than the infringement." *Id.* at 669. Petitioner claims that the Ninth Circuit concluded that the defendant's "entire gross revenues . . . were to be awarded the copyright owner." (Petition, p. 10) In fact, the Ninth Circuit found that the amount contributed by the infringing material was "more than de minimis" and remanded the case "with instructions that the district court award [plaintiff] more than a de minimis portion" of the defendant's profits. *Id.* at 670.

awards the plaintiff only the 'profits of the infringer *that are attributable to the infringement*' ").

A "reasonable approximation of the portion of [defendant's] profits due to the use of the infringing" material has similarly been found to be the proper measure where, as here, profits are earned in the form of a flat fee. *Cream Records*, 754 F.2d at 829 (directing that monies paid to advertising agency be reasonably apportioned to reflect amount due to use of infringing material). In the case of the production of a movie, as *Walker* notes (28 F.3d at 413), *Sheldon* held that it was proper to take into account such items as the drawing power of stars – evidence which the District Court relied upon in apportioning Amblin's fee. *Sheldon*, 309 U.S. at 407; *see also Abend v. MCA, Inc.*, 863 F.2d 1465, 1480 (9th Cir. 1988), *aff'd*, 495 U.S. 207 (1990) (directing that defendants' profits should be apportioned to take into account the value to the film derived from the creative efforts of the many people other than the author of the original story).

Margolin's testimony, as discussed above, is the type of testimony that this Court approved in *Sheldon*, where the parties offered producers as expert witnesses on apportionment of profits (*Sheldon v. Metro-Goldwyn Pictures Corp.*, 106 F.2d 45, 50 (2d Cir. 1939)):

> "By virtue of an extensive experience, [the producer and exhibitor expert witnesses] had an intimate knowledge of all pertinent facts relating to the production and exhibition of motion pictures. . . . Confronted with the manifest injustice of giving to petitioners all the profits made by the motion picture, the court in making an

> apportionment was entitled to avail itself of the experience of those best qualified to form a judgment in the particular field of inquiry and come to its conclusion aided by their testimony." *Sheldon*, 309 U.S. at 408-09.

B. The District Court Performed A Relevancy And Reliability Assessment Before Admitting Into Evidence The Expert Witness Testimony Regarding Apportionment Of Profits

Petitioner's argument that the District Court did not comply with *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137 (1999), in admitting Margolin's testimony is contrary to the record. *Daubert* and *Kumho* provide the District Court with broad latitude in conducting a relevancy and reliability assessment, and the District Court's decision to admit Margolin's testimony fell well within its discretion. Petitioner's argument that Margolin's analysis was not subject to industry standards or peer review is meritless. Such standards are inapposite here, because apportionment is a test created by the Copyright Act to be employed in copyright infringement litigation. Thus apportionment is unlikely to be the subject of industry standards or peer review.

After considering Margolin's qualifications and methodology, and relevant authorities, including the Copyright Act, *Sheldon*, *Daubert* and *Kumho* (TT [5/27/99] 39-51), the District Court accepted Margolin's testimony:

> "The issue to be decided here is how much of the gross receipts or the profit of a work of art such as a – or a piece of entertainment such as a

film can be attributed to certain elements, and what Mr. Margolin is qualified to do, based upon his extensive experience in the movie industry as a producer, is to determine how much it will take to make a film, either based upon his independent assessment or upon the budget given to him by others and to spend that budget on the different materiel and human components that are required to make a film.

"Mr. Margolin has testified that he has over 120 hours of film to his credit which attest to his substantial experience in this realm.

"In my view, he is qualified as an expert based upon his experience. His qualifications consist of on the job training since the middle 1950's.

"I am not sure where one could go to receive a degree in this so I think that on the job training is the best experience that one could have in this area, and, accordingly, I will accept Mr. Margolin as an expert and permit him to testify on the general subject of the evaluation of the different components that go to making up a film and in specific . . . the value of the block. [¶] Here I find that Mr. Margolin's background makes his testimony reliable. So I will accept him as an expert." (TT [5/27/99] 49:13-51:7)

At Petitioner's request, the District Court re-read the *Kumho* decision and announced that the *Kumho* analysis confirmed its decision:

"And here, in this case, I have reviewed Mr. Margolin's qualifications and his testimony in terms of reliability in light of the particular facts and circumstances of this case which involves a quilt used in a movie and other things, and, in

> my view, his testimony should be received and is received." (TT [5/28/99] 1329:9-14)

Thus the District Court fully complied with this Court's instructions in *Daubert* and *Kumho*. Petitioner's objection that Margolin's analysis had not been subjected to the factors enumerated in *Daubert* is misplaced. *Kumho* expressly provides that such factors may be inapposite, and provides the trial courts with necessary and appropriate flexibility to employ all, some or none of such factors in its relevancy and reliability determination:

> "[A]s the Court stated in *Daubert*, the test of reliability is 'flexible,' and *Daubert's* list of specific factors neither necessarily nor exclusively applies to all experts or in every case. Rather, the law grants a district court the same broad latitude when it decides *how* to determine reliability as it enjoys in respect to its ultimate reliability determination." (*Id.* at 142)

Thus the trial record reflects that the District Court complied with its obligations under *Daubert* and *Kumho* to ensure that Margolin's expert testimony was "not only relevant, but reliable." (*Id.* at 147; *citing Daubert*, 509 U.S. at 589)

CONCLUSION

For all of the foregoing reasons, Respondents respectfully request that this Honorable Court deny the Petition.

Respectfully submitted,

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